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6 UNITED STATES DISTRICT COURT  
7 WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

8 JAMES JAKOBSEN and RIKA MANABE,  
and their marital community,

9 Plaintiffs,

10 v.

11 ANNETTE BURROS, an individual;  
12 WELLS FARGO BANK N.A., a federally  
13 chartered banking association; et al.,

14 Defendants.

CASE NO. C19-1254 RSM

ORDER DENYING MOTION TO  
DISMISS PLAINTIFFS' EQUITABLE  
INDEMNITY CLAIM BY WELLS  
FARGO BANK, N.A.

15 **I. INTRODUCTION**

16 This matter is before the Court on the Motion to Dismiss Plaintiffs' Equitable Indemnity  
17 Claim by Wells Fargo Bank, N.A. Dkt. #36. Plaintiffs contend that their Amended Complaint  
18 for Quiet Title, Damages, Breach of Contract, and Injunctive Relief (Dkt. #32) adequately states  
19 a claim for equitable indemnity and that, regardless, Wells Fargo's motion to dismiss is  
20 premature. Dkt. #37. Having considered the matter, the Court agrees and denies the motion.

21 **II. BACKGROUND**

22 The relevant history is set forth in Plaintiffs' Amended Complaint for Quiet Title,  
23 Damages, Breach of Contract, and Injunctive Relief (Dkt. #32) and recounted in their response  
24 to Wells Fargo's motion to dismiss:

1 Plaintiffs, James Jakobsen and Rika Manabe, own real property located at  
2 6810 40th Ave. NE, Seattle, WA 98115 (the “Property”). *Plaintiffs’ Amended*  
3 *Complaint for Quiet Title, Damages, Breach of Contract, and Injunctive Relief*  
4 (the “Complaint”) at ¶ 3.1. In February 2019, Plaintiffs and Burrous entered into  
5 a Residential Real Estate Purchase and Sale Agreement (the “Agreement”) for the  
6 sale and purchase of the Property. *Complaint* at ¶ 3.9. Burrous promised to  
7 convey the Property to Plaintiffs free and clear of all monetary encumbrances in  
8 the Agreement. She also promised to convey marketable title to the Property via  
9 statutory warranty deed at closing.

10 Prior to the Agreement, Burrous and her late husband, Anthony Burrous,  
11 had previously conveyed a deed of trust to Wells Fargo, King County recording  
12 no. 20071003000234 (the “Deed of Trust”). *Id.* at ¶ 3.3. On or about December  
13 25, 2016, Burrous entered into a HAMP modification agreement with Wells Fargo  
14 to modify the loan against the Property. *Id.* at ¶ 3.5. As part of that modification,  
15 Wells Fargo employees informed Burrous that the loan against the Property had  
16 been waived and the Deed of Trust would be released. *Id.* at ¶ 3.10. Wells Fargo  
17 forgave the loan secured by the Deed of Trust. *Id.* at ¶ 3.6. Burrous relied on  
18 information from Wells Fargo when making a decision to sell the Property. *Id.* at  
19 ¶ 3.8. However, Wells Fargo provided false information to Burrous. *Id.*

20 CW Title acted as the escrow agent for the subject transaction. Based on  
21 the information provided to CW Title by Burrous (the false information provided  
22 by Wells Fargo), CW Title sought confirmation from Wells Fargo that the loan  
23 secured by the Deed of Trust was forgiven and that Wells Fargo would direct the  
24 trustee to reconvey the Deed of Trust. *Id.* at ¶ 3.10. Wells Fargo responded,  
twice, stating the account had been closed. *Id.* Wells Fargo said nothing  
regarding a balance remaining on an active account for Burrous. *Id.* CW Title  
also requested confirmation that the Deed of Trust would be reconveyed on March  
6, 2019. *Id.* at ¶ 3.9. In response, Wells Fargo sent a letter to CW Title again  
confirming that the account had been closed and that the Deed of Trust would be  
reconveyed. *Id.*

In reliance on this confirmation that the Deed of Trust would be  
reconveyed, CW Title settled and closed the transaction on March 8, 2019. *Id.* at  
¶ 3.12. Burrous conveyed the Property to Plaintiffs via statutory warranty deed  
as promised. *Id.* at ¶¶ 4.8, 4.9. The CW Title escrow account was closed on  
March 11, 2019 at 11:00 AM. *Id.* at ¶ 3.12. On March 11, 2019 at 3:21 PM,  
Wells Fargo stated for the first time that the remaining payoff of the loan secured  
by the Deed of Trust was \$173,285.23 and that Wells Fargo would not reconvey  
the Deed of Trust. *Id.* at ¶ 3.13.

Wells Fargo initiated non-judicial foreclosure proceedings to foreclose on  
the Property now owned and occupied by the innocent Plaintiffs. *Id.* at ¶ 3.14. A  
trustee’s sale to foreclose on the Deed of Trust was set for September 20, 2019.  
*Id.* Only after Plaintiffs initiated this action did Wells Fargo agree to cancel the  
trustee’s sale pending resolution of this action.

Dkt. #37 at 2–3.<sup>1</sup>

### III. DISCUSSION

#### A. Legal Standard for Motion to Dismiss

Dismissal under Federal Rule of Civil Procedure 12(b)(6) “can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory.” *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990); *see also* FED. R. CIV. P. 8(a)(2). While considering a Federal Rule of Procedure 12(b)(6) motion, the court accepts all facts alleged in the complaint as true and makes all inferences in the light most favorable to the non-moving party. *Baker v. Riverside Cnty. Office of Educ.*, 584 F.3d 821, 824 (9th Cir. 2009) (citations omitted). The court is not required, however, to accept as true a “legal conclusion couched as a factual allegation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). “Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” *Id.* at 679 (citations omitted).

“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Id.* at 678 (quoting *Twombly*, 550 U.S. at 570). This requirement is met when the plaintiff “pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* (quoting *Twombly*, 550 U.S. at 556). The complaint need not include detailed allegations, but it must have “more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555. “The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer

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<sup>1</sup> The Court made several minor alterations to the citations.

possibility that a defendant has acted unlawfully. . . . Where a complaint pleads facts that are merely consistent with a defendant’s liability, it stops short of the line between possibility and plausibility of entitlement to relief.” *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556, 557). Absent facial plausibility, a plaintiff’s claims must be dismissed.

## **B. Equitable Indemnity**

The “American Rule” provides generally that “[e]ach litigant pays [their] own attorney’s fees, win or lose, unless a statute or contract provides otherwise.” *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 252–53 (2010); *see also Ruckelshaus v. Sierra Club*, 463 U.S. 680, 683 (1983); *Blueberry Place Homeowners Ass’n v. Northward Homes, Inc.*, 126 Wash. App. 352, 358, 110 P.3d 1145, 1149–50 (2005). As a limited exception, Washington sometimes allows a party to recover attorneys’ fees as consequential damages under a theory of equitable indemnity:

Under this theory, “where the acts or omissions of a party to an agreement or event have exposed one to litigation by persons—that is, to suit by persons not connected with the initial transaction or event—the allowance of attorney’s fees may be a proper element of consequential damages.” “When the natural and proximate consequences of a wrongful act of A involve[s] B in litigation with others, B may as a general rule recover damages from A for reasonable expenses incurred in that litigation, including attorney’s fees.”

*Blueberry Place Homeowners Ass’n*, 110 P.3d at 1149–50 (citations omitted). Equitable indemnity is also sometimes referred to as an “ABC” claim, with three elements “necessary to create liability: (1) a wrongful act or omission by A toward B; (2) such act or omission exposes or involves B in litigation with C; and (3) C was not connected with the initial transaction or event[—]the wrongful act or omission of A towards B.” *Manning v. Loidhamer*, 13 Wash. App. 766, 769, 538 P.2d 136, 138 (1975).

Wells Fargo maintains that Plaintiffs attempt to pursue a claim that, if it exists at all, is for Burros to pursue. Dkt. #38 at 1–3. Wells Fargo argues that Burros is necessarily cast as the

1 “B” party and that Plaintiffs, accordingly forced into the “C” role, may not pursue an equitable  
2 indemnity claim. *Id.* The Court does not agree that this is necessarily the case.

3 Washington case law certainly makes clear that the “ABC” formulation is the classic  
4 example of an equitable indemnity claim. But Wells Fargo does not adequately establish that the  
5 formulation is intended to restrict the underlying claim: “where the acts or omissions of a party  
6 to an agreement or event have exposed one to litigation by persons—that is, to suit by persons  
7 not connected with the initial transaction or event—the allowance of attorney’s fees may be a  
8 proper element of consequential damages.” *Blueberry Place Homeowners Ass’n*, 110 P.3d at  
9 1149–50 (citations omitted).

10 Particularly important in this regard is *Wells v. Aetna Ins. Co.* 50 Wash.2d 880, 376 P.2d  
11 644 (1962). In *Wells*, a car dealership sold Wells a car that was already encumbered by a lien.  
12 When the prior lien led the state to suspend Wells’ title, he sued to quiet title, joining the car  
13 dealership, its insurer, the prior purported purchaser, and that purchaser’s financier. *Id.* at 645.  
14 Title was ultimately quieted in Wells and Wells was awarded attorneys’ fees on the basis of  
15 equitable indemnity. *Id.* In affirming, the Washington Supreme Court rejected the argument that  
16 Wells was not forced into litigation, indicating that he was “required to defend [his] right to the  
17 automobile against the claim asserted in the cross-complaint of” one defendant and an  
18 interpleader action of another defendant. *Id.* at 645–46.

19 The posture of this case is broadly that of *Wells*. Plaintiffs bought property to which  
20 Wells Fargo disclaimed an interest. When Wells Fargo changed course, Plaintiffs were  
21 compelled to sue and quiet title.<sup>2</sup> Taken as a whole, the amended complaint alleges a claim for  
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24 <sup>2</sup> In fact, Plaintiffs allege that they only initiated this action after Wells Fargo initiated nonjudicial  
foreclosure against Plaintiffs’ property. Dkt. #32 at ¶ 3.15.

1 equitable indemnity that is sufficient at this stage of the proceedings.<sup>3</sup> *N. Star Int’l v. Arizona*  
2 *Corp. Comm’n*, 720 F.2d 578, 581 (9th Cir. 1983) (“The purpose of a motion to dismiss under  
3 rule 12(b)(6) is to test the legal sufficiency of the complaint.”) (citing *Peck v. Hoff*, 660 F.2d 371,  
4 374 (8th Cir.1981)). “[A] case should be tried on the proofs rather than the pleadings.” *Rennie*  
5 *& Laughlin, Inc. v. Chrysler Corp.*, 242 F.2d 208, 213 (9th Cir. 1957) (citation omitted); *Von*  
6 *Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 969 (9th Cir. 2010) (basis for  
7 dismissal must be clear on the face of the complaint).

8 To be sure, there are real questions as to whether equitable indemnity is available to  
9 Plaintiffs in this case. Outside of *Wells*, no case addresses whether a plaintiff may directly seek  
10 equitable indemnity. Plaintiffs’ case certainly is not the “classic formulation” of an equitable  
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13 <sup>3</sup> The Court further notes that Wells Fargo does not establish that Washington treats equitable  
14 indemnity as a standalone claim. Rather, equitable indemnity entitles a party to recover its  
15 attorneys’ fees as an aspect of compensatory damages. *Thomas v. Gaertner*, 56 Wash. App. 635,  
16 638, 784 P.2d 575, 577 (1990) (“where the natural and proximate consequences of the acts or  
17 omissions of a party to an argument or an event have exposed another person to litigation with a  
18 third person, equity may allow attorney fees as an element of consequential damages”) (citations  
19 omitted); *see also Wells*, 376 P.2d at 645–646 (“The fees are a loss occasioned by the action of  
the wrongdoer.”). The award of attorneys’ fees still must be premised on a wrongful act or  
omission. *Newport Yacht Basin Ass’n of Condo. Owners v. Supreme Nw., Inc.*, 168 Wash. App.  
86, 105, 285 P.3d 70, 82 (2012) (citation omitted) (plaintiff must prove “that the defendant  
committed a ‘wrongful act or omission’ against the party bringing the claim”). “Generally, this  
wrongful act must involve a breach of contract or tortious conduct by the party against whom the  
claim is asserted.” *Id.* at 82 (citing *Manning*, 538 P.2d 136).

20 To the extent Plaintiffs seek attorneys’ fees only as an aspect of damages on another claim, Rule  
21 12(b)(6) may not be the proper mechanism for Defendants to test the theory. *See United States*  
22 *v. Maricopa Cnty., Ariz.*, 915 F. Supp. 2d 1073, 1082 (D. Ariz. 2012) (“A 12(b)(6) motion to  
dismiss challenges the legal sufficiency of the pleadings, not the appropriateness of the relief  
23 sought.”); *Redwind v. W. Union, LLC*, No. 3:18-CV-02094-SB, 2019 WL 3069864, at \*4 (D. Or.  
24 June 21, 2019), *report and recommendation adopted*, No. 3:18-CV-2094-SB, 2019 WL 3069841  
(D. Or. July 12, 2019) (Rule 12(b)(6) permits dismissal of a claim from the complaint, not  
components of individual claims).

1 indemnity action.<sup>4</sup> Further, the highly intertwined nature of Plaintiffs' claims against Burros and  
2 Wells Fargo may preclude equitable indemnity.<sup>5</sup> Likewise, Wells Fargo points out that Plaintiffs'  
3 associated claims against Burros may doom an equitable indemnity claim.<sup>6</sup> And lastly, Plaintiffs  
4 themselves may be too intricately involved in many of the transactions at issue.<sup>7</sup>

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7 <sup>4</sup> *C.f. Curtley v. Sec. Savings Soc'y*, 46 Wash. 50, 89 P. 180 (1907). In *Curtley*, a land company  
8 sold Curtley a piece of land it no longer owned. Curtley contracted for construction of a residence  
9 and bought building plans. When the prior sale was discovered, Curtley had nowhere to build  
10 his house and sued the land company for his damages. Concurrently, the contractor sued Curtley  
11 and obtained a judgment for breach of their contract. When the land company was ultimately  
12 found liable to Curtley, the Washington Supreme Court explained that "the rule is that reasonable  
attorney's fees, when paid, or contracted to be paid, for defending an action, are a part of the  
damages, and are recoverable under circumstances that will permit a recovery of the amount of  
the judgment entered in the action." Accordingly, Curtley's damages included the amount of the  
judgment in his breach of contract case and his reasonable attorneys' fees for defending that  
action.

13 Certainly, Plaintiffs are in a different position here. They were not forced to defend against  
14 another's lawsuit because of Wells Fargo's actions and instead chose to initiate the action to quiet  
15 title. But in *Wells* the Washington Supreme Court set forth the claim as merely involving  
16 "plaintiff in litigation with others." *Wells*, 376 P.2d at 645. Similarly, the *Wells* court did not  
indicate whether the award of fees was limited to the fees expended defending cross-claims or  
extended to all fees expended "to defend [his] right to the automobile." *Id.*

17 <sup>5</sup> The third party involved in the litigation must be unconnected from the original transaction.  
18 *Manning*, 538 P.2d at 138 ("The original suit generating the expenses must be instituted by a  
third party not connected with the original transaction.") (citing *Armstrong Constr. Co. v.*  
*Thomson*, 64 Wash.2d 191, 195, 390 P.2d 976 (1964)).

19 <sup>6</sup> "[A] party may not recover attorney[s'] fees under the theory of equitable indemnity if, in  
20 addition to the wrongful act or omission of A, there are other reasons why B became involved in  
21 litigation with C." *Blueberry Place Homeowners Ass'n*, 110 P.3d at 1150 (quoting *Tradewell*  
*Group, Inc. v. Mavis*, 71 Wash. App. 120, 857 P.2d 1053, 1057 (1993)).

22 <sup>7</sup> *Porter v. Kirkendoll*, 194 Wash. 2d 194, 210–11, 449 P.3d 627, 637 (2019) (noting that a critical  
23 inquiry is whether the party seeking equitable indemnity was "exposed" or "involved" in  
24 litigation on account of their own actions) (citation omitted); *see also Newport Yacht Basin Ass'n*  
*of Condo. Owners*, 285 P.3d at 82 ("because Bridges' own acts and omissions contributed to its  
involvement in litigation with Seattle Boat, as did the negligent acts and omissions of the title  
insurer, Bridges cannot rely on principles of equitable indemnification").

1 But these issues typify the necessarily detailed consideration of each individual  
2 interaction and the concurrent involvement of the parties and their agents and precisely which  
3 transaction caused Plaintiffs to incur legal expenses. These questions cannot be answered at this  
4 stage of the proceedings. *C.f. Murphy v. Fid. Abstract & Title Co.*, 114 Wash. 77, 78, 194 P.  
5 591, 592 (1921) (considering application of equitable immunity where case proceeded on  
6 undisputed facts). Indeed, most Washington cases addressing the issue of equitable indemnity  
7 follow a trial and the claims are generally raised in the context of a post-trial motion for attorneys'  
8 fees. *Id.*; *Armstrong Const. Co. v. Thomson*, 64 Wash. 2d 191, 390 P.2d 976 (1964); *Manning*,  
9 538 P.2d 136; *N. Pac. Plywood, Inc. v. Access Rd. Builders, Inc.*, 29 Wash. App. 228, 236, 628  
10 P.2d 482, 487 (1981); *Tradewell Grp., Inc. v. Mavis*, 71 Wash. App. 120, 857 P.2d 1053 (1993);  
11 *Newport Yacht Basin Ass'n of Condo. Owners v. Supreme Nw., Inc.*, 168 Wash. App. 86, 285  
12 P.3d 70 (2012).

#### 13 IV. CONCLUSION

14 Having considered the motion, the relevant briefing, and the remainder of the record, the  
15 Court hereby finds and ORDERS that the Motion to Dismiss Plaintiffs' Equitable Indemnity  
16 Claim by Wells Fargo Bank, N.A. (Dkt. #36) is DENIED.

17 Dated this 31 day of March, 2020.

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19 RICARDO S. MARTINEZ  
20 CHIEF UNITED STATES DISTRICT JUDGE  
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